No. 2879

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK P. McKINNEY, as Receiver of the OLYMPIA BANK & TRUST COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA,

Appellees,

and

C. S. REINHART and C. WILL SHAFFER, Stockholders of OLYMPIA BANK & TRUST COMPANY, a Corporation, for Themselves and All Other Stockholders of Said Company,

Appellants,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA,

Appellees,

and

ROY A. LANGLEY, as Receiver of the STATE BANK OF TENINO,

Appellant,

vs.

UNITED STATES NATIONAL BANK OF CENTRALIA, a Corporation, and A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA,

Appellees.

REPLY BRIEF OF APPELLANTS, McKINNEY, RECEIVER, AND THE INTERVENERS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

P. M. TROY,
Solicitor for Frank P. McKinney, as Receiver of the OLYMPIA BANK & TRUST COMPANY, a Corporation.
Business and Post Office Address: Olympia National Bank Building, Olympia, Washington.

C. WILL SHAFFER,
Solicitor for Interveners.

The Washington Standard Print, Olympia, Wash.

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Counsel for appellee, it seems to us, is attempting to use the same tactics in this court which he used, possibly with success, in the lower court. There he presented his case on the theory that the Olympia Bank & Trust Company was organized under the general banking act of the State of Washington, which act he read to the court, and which act permits a bank to be organized with only a part of its capital stock paid in, permitting the rest of it to be sold, hypothecated or disposed of later on. In the rush to close up this case the court's mind was not disabused of that fact, as is shown on page 557 of the supplemental transcript.

By Mr. Vance, on cross-examination of Mr. Gilchrist:

"Q. It was equally well known to you as a rule of law, and to him, that this bank could not borrow money or do any business until the stock was paid for?

A. They couldn't organize or get started until the stock was fully paid for.

Q. You both knew that at the time?

By Mr. Goodale: I object to that. I don't understand that to be the law at all.

By the Court: The objection may be sustained."

After this appeal was taken the appellants, though not required to do so, served on appellee a

complete transcript of the testimony the same as the copy he has filed in this court. Later the condensed transcript was also served on him, though not required by law, and he proposed additional parts of the record to be incorporated into this condensed statement. (See appellee's praecipe for transcript of record, p. 204, Trans. of Rec.) And compelled us to print over fifty pages of tabulated matter that to us seemed to have no relevancy whatever to this case. (See pp. 224-280, Trans. of Rec.)

He had notice of the settling of this condensed statement, and counsel and court waited until late in the afternoon for his appearance before settling the statement. After the condensed statement was settled and was printed by the clerk of this court, printed copy was mailed to the appellee, and was in his possession some weeks, and after the appellants had prepared and served their brief, and the interveners had prepared their brief, he then moves this court for a dismissal on the ground that he had no notice of the settlement of the condensed statement.

He then urged upon this court that the condensed statement was untrue, and this court gave him the right to file the stenographic copy of the evidence served upon him by appellants, which he did and denominates a supplemental transcript, and to point out wherein the condensed statement was un-

true. To this order of the court we think he has not complied. He did not in oral argument, nor does he in his brief attack the condensed statement. Inasmuch, however, as his brief refers the court to the complete typewritten transcript in most instances, appellants have asked permission to reply, which the court granted, and this brief is filed in accordance with such order.

FALSE STATEMENTS MADE BY APPELLEE.

Counsel attacks, especially the interveners' brief, as being false and misleading, but interveners deny such claim, and contend nothing has been stated not contained in the record or included in such matters of which the court may take judicial notice.

On the contrary, appellants think that counsel for the appellee has misquoted the record, and these mis-statements will be numbered with the page of the appellee's brief indicated and later on will be discussed in the order in which they are numbered.

MIS-STATEMENTS LISTED.

1. Nearly all of them admit their notes were not bankable paper. (p. 6.)
2. That they were not worth their face or that they do not know what their notes were worth, if anything. (p. 6.)

3. Hays came from Montana voluntarily to testify as a witness for appellant. (p. 7.)
4. That loan was made on capital stock. (p. 7.)
5. That Gilchrist received no money but only stock of the Olympia Bank & Trust Company. (p. 8.)
6. That the obligations given by Hays to Gilchrist were obligations of the Olympia Bank & Trust Company. (p. 9.)
7. That Gilchrist was to be made an officer in the Olympia Bank & Trust Company. (p. 9.)
8. That the corporate stock of the Olympia Bank & Trust Company was charged on books of the United States National Bank. (p. 9.)
9. That Hays' note of $12,500 was charged back "in accordance with previous agreement." (pp. 9-10.)
10. That the directors of the United States National Bank did not know of the dealings of Hays until September 14th. (p 10.)
11. That there was ground for suspicion that Hays had destroyed his notes. (Bottom of p. 10.)
12. That interveners accepted the tender of the notes of the stockholders other than Hays. (p. 11.)
13. That the giving of the credit by United States National Bank was *ultra vires.* (p. 12.)

14. That the directors or any directors of the Olympia Bank & Trust Company caused an officer of the United States National Bank to violate his duty. (p. 13.)
15. That the United States National Bank took into its possession the worthless notes of the incorporators of the Olympia Bank. (p. 13.)
16. That an officer of the United States National Bank certified to a non-existent fact. (p. 14.)
17. That the stock of the Olympia Bank & Trust Company was handed to Gilchrist as collateral. (p. 17.)
18. That the original credit of the Olympia bank was fraudulent and void. (p. 17.)
19. That Gilchrist informed Daubney or his other directors that he was promised a position as an officer in the Olympia Bank & Trust Company. (p. 21.)
20. That Gilchrist made a false entry of credit in favor of the Olympia Bank. (p. 22.)
21. That the stockholders of the Olympia Bank & Trust Company authorized Hays to make all its financial arrangements. (p. 23.)
22. That there was no evidence that the certificate or affidavit made by the cashier of the United States National Bank was ever brought to the attention of the state bank examiner or other-

wise actually used.

23. That the recovery sought in this action is unnecessary to meet the claims of all depositors. (p. 26.)
24. That both banks are bound by the action of Hays and Gilchrist in issuing the drafts. (p. 27.)
25. That any part of the $50,000 credit was never withdrawn or attempted to be withdrawn. (p. 33.)
26. That the other stockholders of the Olympia Bank & Trust Company knew anything about Hays' transaction with Gilchrist in obtaining the credit that Hays obtained. (p. 34.)
27. That the books of the Olympia Bank & Trust Company showed any connection with the United States National Bank other than a credit in that bank or that any of the directors knew of any arrangement Hays had with the United States National Bank. (p. 35.)
28. That Howell congratulated Hays upon making his deal with Gilchrist. (p. 35.)
29. That this action is for the benefit of the interveners. (p. 39.)
30. That $30,000 of the deposits of the Olympia Bank & Trust Company were state deposits and have been duly repaid. (p. 39.)

31. That the assets of the receiver of the Olympia Bank & Trust Company will more than pay all of its depositors. (p. 40.)
32. That interveners or the receiver of the Olympia Bank & Trust Company do not come with clean hands. p. 40.)
33. That the directors of the Olympia Bank & Trust Company practiced a fraud upon the directors of the United States National Bank. (p. 42.)
34. That the interveners are attempting to "enrich themselves at the expense of receiver Titlow's impoverished creditors." (p. 46.)
35. "That all of the stockholders (of the Olympia Bank & Trust Company) were cognizant of or at least fully charged with the knowledge of the illegal and fraudulent character of the incorporation." (p. 47.)
36. That appellees fail to show transactions. (p. 50.)
37. That Gilchrist made a mistake when he says "charged to the Union Trust Company." (p. —.)
38. That the Tenino banking account in the United States National was overdrawn. (p. 52.)
39. That books of Olympia bank were unreliable. (p. 52.)
40. That witness Blumauer was prejudiced against

appellee. (p. 58.)

41. That Olympia bank never notified the United States National Bank of its remittances to Tenino. (p. 59.)
42. That appellants are not entitled to a preference. (p. 73.)
43. That appellants asked and received in open court the stockholders' notes. (p. 75.)
44. That the Hays' $24,050 note was not transferred to the Union Loan & Trust Company. (p. 81.)
45. That Gilchrist was not an officer in the Union Loan & Trust Company. (p. 81.)

DISCUSSION OF MIS-STATEMENTS.

The specifications of mis-statements and conditions of appellee have far out-numbered what was first contemplated, but will be discussed and shown wherein they are incorrect as briefly as possible.

1. None of the witnesses testified that the notes given Mr. Hays were worthless. Two of them, out of a sense of modesty said, possibly their notes were not worth face value. In their minds, it was for other people to place the valuation of their securities as commercial paper. Counsel cites in support of his contention, Howell's testimony, but Howell, in addition to his note was giving other evidences of valuation, so that the consideration of Hays was not

worthless.

"Q. How did you pay for that stock, Mr. Howell?

A. Why, I had an agreement with Mr. Hays, by which he was to pay for the stock, and I was to give him an agreement in return for the payment of the stock."

(Supp. Tr., 314.)

Gilchrist testified many times, that these notes were valuable notes. See Supp. Tr. 524-525, and intervener's brief, p. 18.

2. This is answered by No. 1, above.

3. The record nowhere shows that Hays came from Montana voluntarily. True there was no subpoena issued, or commission to take his deposition, but the fact is, that it required great effort to get Hays to come. Hays no longer had any interest in the bank. He had gone through bankruptcy. He could not even be touched on his statutory liability on his stock. Nor is there any indication that he was more anxious for our success in this cause, than for our defeat. True he was our witness, but it is very doubtful if he was as valuable to us as their witness Gilchrist, except when Gilchrist became advocate instead of witness.

4. The capital stock of the Olympia Bank &

Trust Company was not issued until at least ten days after the Olympia Bank & Trust Company opened its doors. The certificates had to be printed, and the order for the printing was not given until after the bank was organized, because the name of the institution was not definitely fixed until that time. Gilchrist says he made the loan to Hays. True, he has been coached to say in some places, that he made a loan to the Olympia Bank & Trust Company, but he always comes back to the proposition that his dealings were with Mr. Hays only. (See Supp. Tr. 518.)

"Q. And you testified before that the notes that Mr. Hays gave were his personal notes.

A. They were signed by W. Dean Hays, that was all."

In truth, the credit established by the United States National Bank was not on fictitious evidences of valuation, but on good commercial paper. The United States National was given a draft for $2,000 cash; was given $11,400 in notes, which Gilchrist said were good, and which statement he repeated many times in his evidence; and which notes were not objected to by any of the directors of the United States National, and was given a credit in the Union Loan & Trust Company, a $100,000 banking corporation, of $24,050, and Hays' personal note to the United States National Bank for $12,500.

Mr. Gilchrist as head of the Union Loan & Trust Company could loan Hays any amount he pleased, without any question by anybody parties to this action. He took that credit from the Union Loan & Trust Company, on which to base the credit extended by the United States National. He had agreed to buy Hays' stock in the Tenino bank, and in that deal for buying stock, had agreed to carry Hays for $10,000 to $15,000. It must be assumed, that as a business man, Gilchrist knew the valuation of the stock of the Tenino bank, and when he agreed to supply Hays with sufficient funds to carry $10,000 to $15,000 of stock in the Olympia Bank & Trust Company, he was making a good business deal.

It is denied here, that Gilchrist purchased the interest of Hays in the Tenino State Bank. Hays says that he purchased it and had sent the young Mr. Daubney to take his place.

(Supp. Tr., 64, lines 9 and 10.)

Again Mr. Daubney came from the Union Loan & Trust Company, which was owned by the same people who owned the United States National.

(Supp. Tr., 64, line 12.)

And again:

"A. Oh, along in June or July, whenever Mr. Gilchrist sent that man up there to take my place. I

don't know. It was June or July, 1914."

(Supp. Tr., 163, lines 14 to 16.)

These men, the record shows, had been a little careless in their business dealings with each other; but Hays says he agreed to sell to Gilchrist.

"A. Yes, he said he would buy it at the price I mentioned, providing that after an examination conditions were found all right; notes all right. He and Mr. Daubney came up there and made an examination of the records and he said he would take it, and he sent Mr. Daubney up there and I went to Olympia to organize this bank and did organize it."

(See Supp. Tr., line 30, p. 65; lines 1 to 5, p. 66. See also Supp. Tr., 64, lines 9 to 21; also Supp. Tr. 163, lines 14 to 16.)

Blumauer was asked and replied as follows:

"Q. And after he (meaning Hays) ceased, you were the manager.

A. To some extent.

Q. Who, if anyone, took Mr. Hays' place in the bank when he left, at that time, whenever it was.

A. Mr. Daubney, one of the younger Daubneys; I have forgotten his initials. We called him Maime. M. A., I think it was.

Q. You know where he came from.

A. Centralia, I think. He was employed at the

Union Loan & Trust Company, Centralia."

(Supp. Tr., 113, lines 4 to 16.)

And Gilchrist says:

"We had sent Mr. Daubney up to assist in managing the Tenino bank."

(Trans. Rec., 115, and Supp. Tr., 489, lines 23 to 25.)

Now, if Daubney was employed in one of Gilchrist's banks in Centralia, and was sent to Tenino to take charge of a bank, which Hays said he sold to Gilchrist, and Blumauer says Daubney was managing, and Gilchrist says Daubney was assisting in managing, it looks as though there was an actual sale thereof. In law the stock had not been transferred. And Gilchrist further testifies:

"Q. You expected to take Hays' notes for the stock he subscribed to, didn't you; you knew he didn't have the cash to pay for the $10,000 or $15,000 worth of stock, didn't you?

A. Well, if you go back to that, you will have to go back to where he represented he was selling his interest in the State Bank of Tenino to me.

Q. To you?

A. Yes."

(Supp. Tr., 526, lines 28 to 30, and 527, lines 1 to 6.)

Now, Gilchrist got something therefor, for Hays' $12,500 note, and that's the only note of Hays

the United States National had. The $24,050 note was never in the United States National Bank.

"By Mr. Goodale:

Q. Did you, in fact, place the note of W. Dean Hays for $24,000 in the United States National Bank of Centralia, or the Union Loan & Trust Company?

A. I directed that the $24,050 note, that that be charged to the Union Loan & Trust Company; therefore the note never went into the files of the United States National Bank.

Q. Never was entered as a discount or asset of the United States National Bank?

A. No wise, it was charged to the Union Loan & Trust Company and credited to the Olympia Bank & Trust Company."

(Supp. Tr., 505, lines 18 to 28.)

He testified to the same thing again:

"A. The entries were made simultaneously. This entry of $24,050 never went through the United States National at all."

(Supp. Tr., 531, lines 18 to 20.)

Any bank in the country would have accepted a draft of $24,050 on the Union Loan & Trust Company. Mr. Gilchrist had a right to make a loan out of the funds of the Union Loan & Trust Company.

and his agreement with Mr. Hays is practically this: He would buy Hays' stock in the Tenino bank; he would finance Hays to the extent of $10,000 to $15,000 to purchase stock in the Olympia Bank & Trust Company—they finally split the difference and made it $12,500; that as the head of the Union Loan & Trust Company he would loan Hays $24,050, by which to purchase the remainder of the stock of the Olympia Bank & Trust Company, with the understanding that Hays was to dispose of this $24,050 of stock as rapidly as possible, and as his stock was sold, his debt to the Union Loan & Trust Company would accordingly be cancelled; and Gilchrist would take this stock as collateral for this loan, which he says time and again was only for the Hays loan, and in fact he didn't think there was any other stock transferred to him except the Hays stock.
(Supp. Tr., 524, lines 18 to 30, and 1 to 11, p. 525.)

"A. Yes, he was to dispose of this stock as quickly as he could, and from the representations he had made, we had every reason to believe it would be taken very quickly; take up his indebtedness."

(Supp. Tr., 542, lines 27 to 30.)

The notes of the other stockholders are good notes, which Gilchrist was glad to get, and he says this makes a good banking proposition; and he said

in effect to Hays:

"Your interest in the Tenino State Bank, and your note for $12,500; your credit of $24,050 in the Union Loan & Trust Company, which will be taken up shortly by the sale of that stock; your $2,000 cash, and your $11,450 in good bankable notes, make a good bankable proposition for the United States National, and with these evidences of valuation, we will give you $50,000 in the United States National."

The capital stock was not issued until ten days after this transaction took place.

(Supp. Tr., 522, lines 18 to 20.)

Therefore the loan was not made on the capital stock.

True, counsel on both sides, and others, have used the expression "capital stock" very loosely in the trial of this cause. They have not distinguished "capital stock" from "capital," and this accounts for some of the confusion in the record.

5. This specification is fully answered by No. 4.

6. Nowhere from the record is counsel justified in making the statement that the obligations given by Hays to Gilchrist were obligations of the Olympia Bank & Trust Company. Discussion in specification 4 above shows that. True, counsel did put into the mouth of his witness those statements,

but when his witness was pinned down on cross-examination, he always stated that he had no dealings with anybody else but Hays. That the Olympia Bank & Trust Company was not yet authorized to do business, and that any loan he made was made to Hays personally.

"A. I can't recall having discussed it with anyone with the exception of Mr. Hays."

(Supp. Tr., 518, lines 12 to 13.)

"Q. Nothing was said about the Olympia bank subscribing for the rest of its own stock?

A. That was an impossibility."

(Supp. Tr., 521, lines 26 to 28.)

"Q. And you testified before that the notes that Mr. Hays gave were his personal notes?

A. They were signed by W. Dean Hays, that is all.

Q. At the time these notes were given, the Olympia Bank & Trust Company had not been organized, had it?

A. Yes, sir.

Q. It had not yet obtained its certificate from you to the effect that it had $50,000 on deposit in your bank?

A. No. They had organized and had their first meeting, but they hadn't got their certificate from

the State Bank Examiner, admitting them, or authorizing them to do business.

Q. They couldn't do business until they got that certificate from the Bank Examiner?

A. No."

(Supp. Tr., 551, lines 3 to 18.)

This theory of the case of appellee that the obligations of Hays were the obligations of the bank is again based upon the wrong statute. The statute relating to banks without trust features. His witness was in the court room all the while under a guard from the United States penitentiary, and caught the spirit of counsel's contention, and endeavored to help him out, but of course he failed when pinned down on cross-examination.

7. That Gilchrist was to be made an officer of the Olympia Bank & Trust Company, is a statement put into the mouth of the witness by counsel. Nobody else testified to it. Hays couldn't promise him he would be an officer. If he and Hays had owned a majority of the stock, and intended to hold it, then of course they could have agreed between themselves to have made Gilchrist an officer, but the matter was contingent upon such ownership, because nobody else knew anything about such an agreement.

8. There is not a particle of evidence that the

corporate stock of the Olympia Bank & Trust Company was mentioned or referred to on the books of the United States National. The capital of the Olympia Bank & Trust Company was on deposit there and the amount of the capital stock appeared on those books, but the corporate stock was not issued until some ten days after the Olympia bank opened.

(Supp. Tr., 522, lines 18 to 20.)

Gilchrist said that what stock he took was collateral only to Hays' notes, (Supp. Tr. 524) and that he did not know there was any other stock than Hays' put up as collateral.

(Supp. Tr., 524, lines 20 to 24.)

9. That Hays' note for $12,500 was charged back, as their books show, on August 31, "In accordance with previous agreements," is the testimony of Gilchrist only. True, their books show that $12,500 was charged to us on that date, but whether it was the note, we had no way of telling. If it was the note, why should they on September 14 order drafts drawn on the Olympia funds to pay Hays' notes? The truth of the matter is, the United States National Bank was at this time in a death struggle. Mr. Dysart testifies that he was trying to raise

> "Three or four hundred thousand to a half million dollars."

(Supp. Tr., 459, lines 8 and 9.)

and he says on page 467 Supp. Tr., that the different banks had agreed to take $125,000 of the United States National's paper. That Director Vaness was bonding his properties for $300,000.

Mr. Hill testifies that at the time the bank failed the deposits in the bank, subject to check, was $469,139.37.

(Supp. Tr., 339, line 3.)

Total deposits were over one million.

(Supp. Tr., 338, line 21.)

Mr. Hill also testifies that shortly after the bank failed other concerns that owed the bank went into bankruptcy. The total of the claims that he filed in the bankruptcy court amounted to over $200,000.

(Supp. Tr., 340.)

This shows the condition of the bank. It was carrying a heavy load of over $300,000 of paper that was all of a questionable value. Hard times in the lumber business had come on; the bank had been carrying these firms, the record will show, and it could not carry them any longer. The bank was crying for help. Every place it could grab a little, it was grabbing for it. The men back of the United States National are to be praised for the heroic effort to save their institution. True, they became desperate, but they were in desperation, and this accounts.

no doubt, for some of the transactions in connection with the affairs of the Olympia Bank & Trust Company. As shown in specification 4, the bank did not make a bad deal in accepting the evidences of valuation, and extending the credit of $50,000 thereon in favor of the Olympia bank. The only questionable part was the $12,500 note to W. Dean Hays, which the manager of the bank, Gilchrist, says he was willing to take, and it was involved in some way in the deal to purchase Hays' interest in the Tenino bank. There can be no question but what an attempt was made to make the best showing possible to the National Bank Examiner. Gilchrist is now in the penitentiary because of his frantic endeavor to save his bank.

(Supp. Tr., 551.)

This is what the books showed on August 19th or 20th: The United States National owed the Olympia Bank & Trust Company $50,000; that on the other side of the ledger was a $2,000 remittance of cash; $11,450 in good bankable notes; $24,050 of a credit in the Union Loan & Trust Company and a $12,500 note of W. Dean Hays, which was backed up collaterally by some deal for the Tenino bank stock. On August 31, this same side of the ledger showed that we had sent to Centralia approximately $40,000 in cash. Now, on August 31, the

United States National charges us with $12,500 more. That is, takes out of what it owes us, which is the same thing as if we had put in that much more money, if this was to cancel Hays' note, because it also kept the note. Now, on September 14, when Dysart ordered Gilchrist to go to Olympia and get drafts amounting to $36,550, and he did get them, that all showed the same thing as adding that much to our account, or as if we had put in that much more cash. In the meantime it had charged us with $9,500 more, which is claimed to be the Blumauer notes, but it kept the notes, and therefore is the same thing as if we had deposited $9,500 more of the funds. So then on September 14th, for the purpose of presenting the matter to the Bank Examiner, this was the condition of its books. It had given us credit of $50,000, and we had deposited about $40,000 in cash, therefore it showed the Olympia bank approximately $90,000. On the other side of the ledger was $11,450 of good bankable notes; $2,000 cash; $24,050, credit in the Union Loan & Trust Company; $12,500 note of W. Dean Hays, backed by some deal for his stock in the Tenino bank; $40,000 in good hard cash in further paid deposits; $12,500 remittance on August 31, a $12,500 draft dated September 14, a $24,050 draft, and a $9,500 remittance at the time the Blumauer notes were charged to us. We

call these remittances, because they charged the items to us, and then kept the evidences of value, which would be the same as if we had returned these evidences of value to them. So, then, the Bank Examiner could see that the United States National owed us $90,000 and had to its credit $134,050. Or, if you work it the other way, the United States National owed us only $28,000, approximately, but had to its credit approximately $80,000; and the law required only about $5,000 on this statement as a cash reserve; so here was $75,000 of credits above the actual cash reserve required.

This explains why the drafts were not returned, and this corroborates Hays' testimony that the drafts were taken to fool the Bank Examiner. It was a common practice of the banks to shunt credits along to each other to meet the Bank Examiner's visits.

(Supp. Tr., 513, lines 9 to 16.)

10. In intervener's brief, it is clearly shown that the directors of the United States National must have known of the relation between the Olympia Bank & Trust Company and the United States National. Undoubtedly they did not know of any unlawful dealings between Hays and Gilchrist, because these unlawful dealings was a theory that was hatched to defeat us. To the directors of the United

States National, at that time, there were no unlawful dealings. The only unlawful dealing that took place was when Dysart, in his desperation ordered Gilchrist to go to Olympia and get Hays to issue drafts to pay Hays' own obligation out of the funds of the bank in which Hays was an officer. It cannot be conceived that these men would do such a thing. The presumption is strong that they intended no such transaction. To do so, would have been committing a felony on their part. Mr. Dysart says that he understood the $24,050 note of Hays was in the Union Loan & Trust Company.

(Supp. Tr., 458, lines 4 to 7.)

Gilchrist testifies that it never went into the United States National Bank, so why should they want a draft for that note.

Dysart says that during September he was quite active on the inside of the bank.

(Supp. Tr., 454, lines 10 to 17.)

He could see the books of the bank. He was a director and second vice-president. If their testimony is to be believed, he could see that the $12,500 note had been charged two weeks before, as Gilchrist says, in accordance with an agreement; then why did they want the $12,500 draft.

Dysart objected to only Hays' note.

(Supp. Tr., 466.)

If he objected to the original proposition, why didn't he attempt to cancel the whole matter. He knew the Olympia Bank & Trust Company was running. He was in the bank, had access to its books, was a director, was second vice-president. Their books showed the credit of $50,000; their books showed that we had deposited $40,000 subsequent to opening the Olympia bank; their books showed the $11,450 notes of other stockholders; their books showed a $2,000 remittance on August 19; their books showed a $24,050 remittance from the Union Loan & Trust Company and their books showed that the $9,500 claimed to be the Blumauer notes, and their files showed these Blumauer notes still in the possession of the United States National Bank; yet he says he did not know of thesee transactions.

If on September 14th, he knew, or had it brought to his mind that Hays and Gilchrist had proceeded unlawfully in these transactions, why did he not repudiate all of them. Why does he claim to repudiate only the Hays transaction, and why does he then to cancel the Hays' transactions commit what is on its face a felony by aiding and abetting in the use of the funds of the Olympia Bank & Trust Company to cancel the private obligations of an officer of the Olympia Bank & Trust Company.

This action of the directors, we claim, is a ratifi-

cation. We don't think they attempted to rescind; but if they did attempt to rescind the Hays' transactions, they approved the whole transactions by not rescinding in toto.

"A national bank which has received and retained the fruits of its contract to pay for goods sold on its credit and delivered to a depositor in pursuance of the contract cannot avoid payment on the ground that the contract was *ultra vires.*

First Natl. Bank vs. Greenville Oil & Cotton Co., 60 S. W. 828; 24 Texas Civ. App 645.

"Where a bank has received and retained the benefit of a contract made by its officers, it cannot plead that the contract was unauthorized by the directors or beyond the power of the bank or its officers to make."

Toole vs. First Natl. Bank of Port Angeles, 33 Pac. 345; 6 Wash. 181.

"A debt incurred by a national bank, for which it receives and retains the consideration, is not void because incurred in violation of Revised Statutes United States, Section 5202, providing that no national bank shall be indebted or in any way liable to an amount exceeding the amount of its capital stock paid in, except on circulation, deposits, special funds, or declared

dividends."

Chemical Natl. Bank of Chicago vs. City Bank of Portage, 40 N. E. 328; 156 Ill. 149.

Wellsburg vs. Kimberlands, 16 W. Va. 555.

"Although restitution of property obtained under a contract which is illegal because *ultra vires,* cannot be adjudged by force of the illegal contract, the courts will compel restitution of property of another obtained without authority of law; and, although the contract under which a national bank obtains money from an innocent third party may be *ultra vires* under Revised Statutes, Sections 5133-5136, the bank may be required to return the money so received to the party entitled thereto."

Citizens' Central Natl. Bank vs. Appleton, Receiver, 216 U. S. 196.

11. The only grounds of suspicion that Hays had destroyed his notes, was in the statement of Gilchrist, himself, that he had delivered the notes to Hays on the morning of September 15th. Why he should have delivered the notes is not explainable. The $24,050 note was never in the United States National Bank. The $12,500 note, he says, was charged off August 31st. The inference would be that he did not deliver the notes, but that he delivered the stock, only for the purpose of hiding it from the National

Bank Examiner. The officers of the United States National had no control over the $24,050 note.

12. The interveners did accept the tender of the notes only on the theory that the notes were to be cancelled; the credit obtained also on those notes to be cancelled, and that the Olympia Bank & Trust Company be given a preferred claim for all funds deposited in the United States National Bank. This the court refused to do. The court cancelled the notes allright, and the credit, but we would be foolish to accept that arrangement, together with only a general claim against the United States National. Our desire was, that all parties should be placed in the same position as they were had no Olympia Bank & Trust Company been organized.

> "As between the immediate parties, fraud makes all things void which is done under its direct influence."

1 Perry on Trusts, Sec. 167.

13. The giving of the credit, was not an *ultra vires* act.

A national bank may take stock in a corporation as collateral.

Shumaker vs. Natl. Mechanics' Bank, 1 N. B. C. 169, 2 Abbott 416.

Canfield vs. State Natl. Bank of Minneapolis, 1 N. B. C. 312.

Baldwin vs. State Natl. Bank, 1 N. W. 261; 2 N. B. C. 278, 26 Minn. 43.

It may even take its own stock as collateral.

First Natl. Bank vs. Lanier, 78 U. S. 369.

Feckheimer vs. Natl. Exchange Bank, 79 Va. 80.

Even if the acts of Gilchrist were *ultra vires,* the bank having received the benefit of that act is estopped.

Bowen vs. Needles Natl. Bank, 94 Fed. 925.

Carr vs. Natl. Bank & Loan Co., 167 N. Y. 375.

Banks may not repudiate unauthorized contract and reap its fruits. See cases cited in Digest of Decisions relating to National Banks, 1914, published under the authority of the comptroller of the currency, pages 515, 516, 517, 518.

And see cases cited *supra.*

14. There is no evidence whatever that the directors of the Olympia Bank & Trust Company, or that even Hays caused an officer of the United States National Bank to violate his duty. The statement to the contrary is child-like. Gilchrist testified time and time again that he had no dealings with anybody but Hays; that he and Daubney, both directors, one the active manager, and the other the cashier, drove to Olympia by auto, and there consulted Hays, and dealt with Hays in regard to the transactions herein

involved. Besides, there was no violation of his duty. It was a fine thing for the United States National Bank to make this deal. Gilchrist, as an officer in the Union Loan & Trust Company, may have made a poor investment in loaning Hays $24,050, to be repaid by Hays as he disposed of that portion of his stock, but Gilchrist surely approves of the credit established by the $11,450 in notes of the other stockholders, and all of the other directors approved of them, and it only remained for the receiver himself to set up that these notes were no good. All the directors approved of the $2,000 remittance, and some of them at least approved of the $12,500 loan to Hays, backed by some sort of a deal he had with Gilchrist for the Tenino bank stock.

15. The notes of the other incorporators were not worthless notes, nor is there a particle of evidence to that effect. Such a statement is a deliberate attempt to mislead the court. None of the directors of the United States National objected to these notes, and Gilchrist testifies many times that they were good notes.

(Supp. Tr., 524-525.)

16. The certificate issued by the officers of the United States National Bank represented a fact. It is not fair to say, as counsel does, that this certificate was to a non-existing fact. The United States

National received for that certificate $2,000 in cash, $11,450 of good notes, $24,050 credit in the Union Loan & Trust Company, and $12,500 note of W. Dean Hays, backed by some deal Gilchrist had with him for the purchase of Hays' stock in the Tenino State Bank. This, we insist, comes very close to making the transaction what may be termed a bankable transaction.

17. The stock of the Olympia Bank & Trust Company was not issued until about September 1, or ten days after the Olympia Bank & Trust Company was organized. Gilchrist says he understood only Hays' stock was put up, and the inference from his testimony is further that it was only the stock represented by the $24,050 loan from the Union Loan & Trust Company which was to be paid back as Hays should dispose of it.

18. Counsel quotes Hays' testimony supporting his contention that the original credit of the Olympia Bank & Trust Company was fraudulent and void. But even this testimony states that Hays used only his individual stock, "about $36,500; near that."

Nor do we claim that Hays borrowed $48,000 from the United States National. We insist that he did not. He borrowed $24,050 from the Union Loan & Trust Company. He borrowed $12,500 from the

United States National on some sort of a pledge or agreement about his stock in the Tenino State Bank.

19. Nor is there any evidence that Gilchrist informed his other directors that he would take a position as an officer in the Olympia Bank & Trust Company. This statement is Gilchrist's own testimony following the words put into his mouth by counsel.

20. We deny that Gilchrist made a false entry so far as the credit of the Olympia Bank & Trust Company was concerned, in regard to the $50,000. We have already shown the basis on which this was given. The whole transaction appeared on the books of the bank so that all the directors might see the same, and of the five directors four of them had their offices in the bank. With the discussions preceding this it is not necessary to go further into details.

21. True, the minutes of the trustees of the Olympia Bank & Trust Company did authorize Reinhart and Hays to do certain preliminary work looking to the opening of the bank, but it is absolutely false that Hays was "authorized to make all its financial arrangements." (See copy of minutes, Supp. Tr., 189, lines 23 to 27.)

22. It is likewise not true that the certificate or affidavit of deposit made by the cashier of the United States National Bank showing a deposit of $50,000 in favor of the Olympia Bank & Trust Com-

pany, was never officially used or seen by anybody except Hays.

This he knows to be an incorrect statement. This certificate was on file in the State Bank Examiner's office at the time the Olympia Bank & Trust Company closed its doors. That such may be filed is the object of the *affidavit* of deposit required by the State Bank Examiner instead of a *certificate* of deposit.

In Vol. 7 of Encyclopedia of Evidence, on p. 990, the text states:

> "Where a statute authorizes executive officers to make general rules for the conduct of public business, and such rules are duly made and published, the courts will take judicial notice of them."

Under this authority we cite a pamphlet furnished by the State Bank Examiner containing the laws relating to banking, and his rules and forms for making reports to his department, and on pp. 3 and 4 of that pamphlet he lays down the rules necessary to follow in order to get a certificate for the organization of a bank or a banking and trust company. This shows the affidavit was used. These rules are as follows:

> "Before granting a charter or certificate of organization, it will be necessary that the fol-

lowing papers be filed with the banking department:

1. Articles of incorporation.

2. Certified copy of the subscription list.

3. Certified copy of the organizers' or subscribers' meeting, where the organization was effected.

4. Certified copy of by-laws adopted by the stockholders.

5. Certified copy of first directors' meeting.

6. Oaths of directors elected to serve until the first annual meeting.

7. *Certificate or affidavit from a solvent bank in regard to capital stock being on deposit.*

8. *Affidavit of president and cashier that the required capital has been fully subscribed and paid.*

9. List of officers and directors and post-office address and estimated net worth of each.

10. A general letter, giving the following information:

(a) Population of city or town where the bank is to be located.

(b) Number of banks already there, name of each, and the amount of deposits of each bank at last call for published statements.

(c) The nearest banks, in adjoining towns and the estimated number of people that would be served by the bank.

11. Letters of recommendation from business men of known repute, showing the business experience and financial and moral standing of the officers and directors of the bank."

In compliance with these rules the State Bank Examiner gave his certificate, which the courts hold cannot be collaterally attacked.

This certificate of the Bank Examiner is the charter of the bank. It is its authority to do business, and it cannot do any banking business until this charter is granted. Hays could not act as cashier of this bank until this charter was given. No act of the bank in the line of banking could be done until this charter was given. The statute says this charter shall be received in evidence to establish the incorporation of the bank. It cannot be attacked collaterally.

"Courts must take judicial notice of charters of banks issued by law."

See *Chamberlayne's Modern Law of Evidence,* Par. 627, note 3.

When the examiner issued his certificate and attached his seal he granted the Olympia Bank & Trust Company "A franchise which cannot be

changed without its consent or dealt with so as to affect contract rights."

1 *Michie, Banks and Banking,* p. 52. See also 1 *Michie,* p. 60.

This charter established the bank. The only way the charter could be attacked was by a direct action to annul on the ground of fraud. Only the state could question the charter. The certificate of the Bank Examiner was conclusive upon all parties and on the courts.

> "Whether shareholders have paid for the stock as the law requires must be proved by the certificate of the officers appointed to execute the law."
>
> 5 Cyc. 437, (d).

The State Bank Examiner's certificate stands in the same relation as the certificate of the Comptroller of the Currency of the United States treasury in relation to United States national banks.

"The question as to whether a bank has violated its charter, cannot be inquired into in a collateral proceeding. This must be done in a proceeding having that single object in view."

1 *Michie, Banks and Banking,* p. 59, Par. 34.

> "The certificate of the Comptroller of the Currency that the capital stock of a bank has been increased to a certain amount is conclusive

of the sufficiency of the facts and the regularity of the proceedings requisite to an increase, and cannot be questioned in any collateral proceeding."

Columbia National Bank of Tacoma vs. Matthews, 85 Fed. 934.

"The action of the Comptroller in issuing a certificate approving an increase of the capital stock of a national bank is not subject to collateral attack."

Brown vs. Tillinghast, 93 Fed. 326.

"The Comptroller's certificate, authorizing an increase of the capital stock of a national bank, is conclusive of the existence of all the facts necessary to authorize such increase in favor of the public, and against the subscribers to such stock."

Bailey vs. Tillinghast, 99 Fed. 801.

"The certificate of the Comptroller of the Currency, approving an increase of the capital stock of a national bank is conclusive of the existence of the facts authorizing such certificate, and a subscriber to the stock cannot question its validity.

Tillinghast vs. Bailey et al., 86 Fed. 46.

23. Nothing could be further from the truth than that the relief sought in this action is unneces-

sary to meet all the claims of our depositors. Our depositors now have due them some $40,000. We got a general claim in the lower court for over $25,000, upon which we will probably realize 50 per cent against the United States National, and probably a claim for $10,000 against Tenino, upon which we may realize 30 per cent, making a claim of about $35,000. As general creditors, if we get fifty cents on the dollar we will realize approximately $18,000, out of which we must pay the costs of the receivership and the litigation and our depositors. The $11,500 notes and the statutory liability on them will not even then be sufficient to meet claims of the depositors for one hundred cents on the dollar by a considerable margin.

We do not think the condition of either the United States National Bank estate, or the Olympia Bank & Trust Company estate have any bearing whatsoever on this controversy, but inasmuch as counsel for appellee has assumed to mention this feature we desire to submit the facts as they are.

24. Appellee says that if Hays issued drafts to defy the Bank Examiner, the Olympia Bank & Trust Company is liable equally with the United States National Bank. This contention hardly needs a refutation. Hays acted without the knowledge of his directors, and for an unlawful purpose to benefit the United States National Bank, using resources of

the Olympia Bank & Trust Company. The United States National Bank profited by this unlawful act, and Hays, if his notes were cancelled by this action, profited also, but not the rest of the directors of the Olympia Bank & Trust Company. It is a general rule of law that a bank is not liable for the criminal acts of its officers when such officers are acting for their individual interest. See cases cited in appellants' briefs.

Here, the United States National, as a bank, all of its directors and depositors received the benefit of this act, and all of its directors knew of it, while none of the directors of the Olympia Bank & Trust Company, except Hays, knew of the transaction, and not only did not benefit by it, but were injured thereby.

> "Where a receiver is given charge of the assets of a national bank, he stands, as to such assets, in the place of the bank, and is chargeable with knowledge of all facts known to the bank affecting the character of the assets."
>
> *People's State Bank vs. Francis,* 79 N. W. 853; 8 N. Dak. 369.
>
> "The rule that knowledge possessed by an agent while transacting business for his principal is imputable to the principal is based on the presumption that he will communicate such

knowledge as his duty requires, and is subject to exception where in the transaction he acts not only for his principal, but also for himself individually, and his interest or conduct is such as to render it certain that he would not make such disclosure."

Bank of Overton vs. Thompson, 118 Fed. 798.

"Knowledge by one of the officers of a bank, who joined in the acceptance for the bank of a negotiable note before due, of a fact which would put a prudent person upon inquiry as to the power of the maker to execute the paper, is sufficient to charge the bank with notice of a disability, if such existed."

Hager vs. Natl. German-American Bank, 31 S. E. 141.

"An agent cannot lawfully act for his principal and for himself in matters in which they have adverse interests, and every person dealing with an agent who is acting for himself as well as for his principal in such matters is put upon inquiry as to authority and good faith of the agent."

Moore vs. Citizens' Natl. Bank of Piqua, Ohio, 15 Fed. 141. (Affirmed, 111 U. S. 156.)

"The cashier of a bank, as such, has no authority to issue cashier's drafts to his own

order in payment of his individual debts, and a creditor accepting a draft so drawn takes the risk of such lack of authority."

Gale vs. Chase Natl. Bank, 104 Fed. 214.

"A bank is charged with the knowledge acquired by its cashier, president or other officers pertaining to transactions within the bank's business."

5 Cyc. 460 (c).

"When an officer is individually interested in a note or other matter, the better opinion is that his knowledge is *not* imputed to his bank, since his interests are best served by concealing it."

5 Cyc. 461 (c).

25. That no part of the $50,000 was ever withdrawn is due to the fact, if it is a fact, that the Olympia bank had deposited more cash subsequent to the giving of this certificate than it had withdrawn. The affidavit of the cashier said it was

"Subject to order of the said Olympia Bank & Trust Company." (See page 170, Transcript of Record.)

Gilchrist testifies that it was subject to check.

Hays says it was subject to check.

"Q. Do you recall whether, or could you tell from an examination of your books, if the $50,000 deposit evidenced by that exhibit 3, was drawn upon

by your bank or checked against?

A. A great deal of it was checked against, and, of course, some added to it. After this deposit was made, we naturally carried on a banking business, drawing drafts against them and sent remittances."

(Supp. Tr., 81, lines 5 and 6.)

26. It has already been clearly demonstrated that none of the other directors of the Olympia Bank & Trust Company knew anything of the Hays transactions with Gilchrist, nor did the books of the bank show any such transactions. Our books were clear. There was the certificate of deposit issued by the officers of the United States National; the certificate of the State Bank Examiner, that we had the $50,000, and our books correspond with the statement, except that our books showed $5,000 more, which we all admit was a mistake, and was charged by Hays near the time our bank failed.

27. This has been fully considered in the preceding specifications. Our books showed nothing more than they would have shown had everything been regular, except the $5,000 Hays had added to the capital stock, and our books and their books tallied, except where they had charged us with items we knew nothing of.

28. Hays, only, testified that Howell congratulated him, and there is every reason to believe that

this congratulation only meant that Hays had made arrangements with the United States National to use it as a depository until we had vaults to handle our funds. Howell denies that he knew anything about Gilchrist in regard to the $50,000, and Hays' testimony saying Howell congratulated him was given in another trial; State vs. Hays.

(Supp. Tr., 602, lines 1 to 6.)

29. It has already been shown that interveners will be liable on their statutory obligation, even if a trust is directed of the funds transmitted to the United States National Bank.

30. The trust deposits made in the Olympia Bank & Trust Company have been repaid to the municipalities which deposited them, but the Olympia Bank & Trust Company has not been relieved. It is of the most puerile fancy to contend that, because the surety companies have paid these funds to the State of Washington and City of Olympia, that the bank is relieved thereby.

31. This is also a puerile statement that has been answered above.

32. He contends that the interveners do not come with clean hands, and infers that the interveners conspired with Hays to perpetrate a fraud on the United States National Bank. This theory has been exploded in the argument heretofore made. In the

first place, all those who gave notes to Hays thought that they, each, were the only ones dealing so with Hays.

(See Supp. Tr., 197, lines 7 and 8.)

That Hays was a prominent man in the community.

(Supp. Tr., 334, lines 22 to 24.)

He was well to do.

(Supp. Tr., 334, lines 18 to 20.)

Had plenty of money.

(Supp. Tr., 332, lines 2 to 4.)

They had confidence in him.

(Supp. Tr., 329, lines 7 to 9.)

This is from Howell's testimony, and testimony of others is the same. The incorporators were familiar with the laws of the State of Washington; they knew the stock must be paid for in cash, as did Gilchrist.

(Supp. Tr., 520, lines 20 to 22.)

And Gilchrist also says that it was impossible for the bank to subscribe for stock.

(Supp. Tr., 521, line 28.)

And that the bank could not open and do business until the stock was sold, and the Bank Examiner's certificate issued.

(Supp. Tr., 551, lines 16 and 17.)

The other stockholders knowing this, their act

was merely the act of borrowing money from Hays or somebody to purchase this stock. Since the United States National had said that the capital was on deposit, and the State Bank Examiner had made his investigation and was satisfied that the stock was paid for in cash, and that the capital stock was on deposit in a solvent bank, there was nothing to arouse suspicion; in fact everything was to inspire confidence.

33. This specification has been discussed above. If a fraud was perpetrated, it was by the United States National on the stockholders and creditors of the Olympia Bank & Trust Company.

34. Nothing could be further from the truth than the inference of attempting to

> "Enrich themselves at the expense of the receiver Titlow's impoverished creditors."

They have already shown that the United States National was benefited by the organization of the Olympia Bank & Trust Company; that if a trust is declared and the two institutions put back just where they were in the beginning, the creditors of the United States National will not be hurt in the least. If the Olympia Bank & Trust Company had not been organized no deposits from the Olympia Bank & Trust Company would have reached the United States National. Why not, then, have the United

States National Bank give us back dollar for dollar for what we put in there? The depositors and creditors of that bank would be just where they would have been had we not been organized, and we would be able to pay our depositors dollar for dollar.

Western German Bank vs. Norvell, 134 Fed. 724.

35. It has been thoroughly established that the stockholders of the Olympia Bank & Trust Company had no knowledge of any fraud in the incorporation. Gilchrist has the words put into his mouth by counsel, on his re-direct examination, that the directors knew all the time and participated in the fraud; but he finally admits that he talked with no one but Hays.

(Supp. Tr., 518, lines 12 and 13.)

All of them denied they knew of Hays' transactions. Everything on its face appeared regular, and they had no means of ascertaining its irregularity. Had they gone to the United States National Bank and made inquiry they could not have found anything fraudulent in the transaction. The books of the United States National Bank showed that we had a credit of $50,000. The officers of the United States National would probably not permitted us to have inquired any further. They would not have told us of any deal with Hays. They would have assured us, as they did by the highest authority that it is possible

to assure, a statement under oath, that our bank had so much money on deposit in the United States National. Such should have satisfied anybody. It satisfied the State Bank Examiner, who has a right to make further inquiries.

36. Counsel says:

"No record of fraud on appellee's books."

Nor is there on appellant's books. There is, however, on the records of the United States National entries, showing that on August 31st, we were charged with $12,500; nothing sent to us for it. Their books also show, that a little later we were charged with $9,500, and nothing sent to us to show what it was for. In fact, it is claimed they were for the Blumauer notes, which are still in the possession of the United States National Bank. On September 14th, their books would have shown that we were charged with $36,550, and nothing transmitted to us. These charges were made on drafts drawn, but these drafts were not negotiated. The $24,050 draft has never yet appeared. The $12,500 reached the State Bank Examiner, after the banks failed, without any evidence of it ever having been endorsed, negotiated or used in any manner, many days after it was issued. It lay in the United States National Bank from the morning of the 15th day of September until it closed its doors, and the comptroller had taken charge. Can

appellee say that their books did not show some irregular transactions? We are sure he cannot point out where our books showed any irregular transactions, except one that we admit, all of us, was a mistake.

37. Why does counsel say that Gilchrist made a mistake when he says that the $24,050 note was charged to the Union Loan & Trust Company? We have shown that Gilchrist testified positively that it never reached the United States National Bank.

(Supp. Tr., 505, lines 21 to 24.)

He again testified to this.

(Supp. Tr., 531, lines 23 to 25.)

Dysart says that he understood it was in the Union Loan & Trust Company.

(Supp Tr., 457-458.)

It was never found in this controversy. No doubt the receiver of the Union Loan & Trust Company is presenting the claim against Hays on this $24,050 note, but it was never in the United States National Bank.

38. The books of the Tenino bank show that the United States National owed the Tenino bank. Mr. Daubney was the representative of Mr. Gilchrist. He was running the Tenino State Bank; he kept the books. These books showed no account with the Olympia Bank & Trust Company. Now, if Mr. Gilchrist's representative put on the books of Tenino,

entries to the effect that Centralia owed Tenino, it must be inferred that such was correct. If Mr. Daubney was helping to manage the Tenino bank and the Tenino bank called upon the United States National for funds, and Mr. Daubney himself did the calling (Supp. Tr., 490, lines 19 and 20), and then the United States National called upon the Olympia bank to remit to Tenino, and the Olympia bank charges the United States National, and the Tenino bank, run by a representative of the United States National, credits the United States National, it would seem to be plausible that the books were correct Daubney being the agent, his principal is bound by his acts.

39. The Olympia books show a charge to the United States National, and it has just been stated that the Tenino books, run by a representative of the United States National, was the same transaction as a credit to the United States National. We fail to see where the Olympia books are unreliable.

40. There was not a particle of evidence to show that Blumauer was against the Appellee. Blumauer and the officers of the United States National Bank had worked together for years. Not a breath of suspicion was imputed to Blumauer, in fact, we think that through his close relationship with the parties connected with the United States National, he was

very reserved in his testimony.

41. Banks, as stated before, have a loose way of doing business. When Gilchrist called for funds, and Hays said he would send them, and the Tenino bank acknowledged the credit as having come from the Centralia bank by notifying Centralia, we think that was notice sufficient.

42. We think we have clearly shown in our opening briefs that we are entitled to a preference. Innumerable authority might be cited to show that we are entitled to preference. He argues that we cannot trace the funds, therefore we are not entitled to preference on that account.

If our deposits were taken through fraud, and the Centralia bank had its assets increased to the extent of our deposits, then it is not necessary that we identify the coin.

See 1, *Morse Banks and Banking,* p. 618, Par. 80.

Western German Bank vs. Norvell, 134 Fed. 724.

43. Appellants-Interveners did ask for the stockholders' notes, but on condition that their prayer be granted—that we be given a preference. It would be folly for us to ask for $11,450 of credit, except on the theory that we wish to put it in *statu quo.* Appellant McKinley, receiver, never asked for re-

turn of the notes, but refused them.

44. Counsel discredits his own witnesses when he says that "the $24,000 note was not in fact rediscounted or transferred to the Union Loan & Trust Company." True it was not. It went direct to the Union Loan & Trust Company. Gilchrist was head of the Union Loan & Trust Company.

"A. I directed that the $24,050 note, that that be charged to the Union Loan & Trust Company, therefore that note never went into the files of the United States National."

(Supp. Tr., 505, lines 21 to 28.)

45. He knows that the Union Loan & Trust Company was the allied state organization of the United States National. The Union Loan & Trust Company was owned by the same people as the United States National.

(Supp. Tr., 64, lines 12 to 23.)

This testimony was not disputed, and the whole record shows that these officers were the same people.

(Supp. Tr., 113, lines 10 to 16.)

They may not have been the record officers but they ran the institution.

APPELLEE'S AUTHORITIES.

The cases cited by appellee we think do not fit this case. His cases, for instance, on the question of *ultra vires* acts of national bank officials are to the effect that such officers may not invest the funds of their banks in the stocks of other corporations for

speculative purposes, or to the effect of prohibiting the guarantee of persons or accounts. None of them goes to the point of making loans on personal notes or collateral security.

CONCLUSION.

We think the record clearly shows: That Gilchrist and Hays had been dealing for some time over the stock of the Tenino State Bank and that the five thousand note of Hays found in the Tenino bank was involved in that deal.

That Gilchrist was anxious to get the Olympia Bank & Trust Company organized so its deposits could help the United States National, and that this was generally known by the other officers of his bank, who were all working desperately to keep their bank going.

That Gilchrist agreed to back Hays to the extent of ten to fifteen thousand dollars in the new bank in exchange for Hays' Tenino stock.

That Gilchrist expected Hays to place about thirty-five to forty thousand dollars' worth of stock with prominent people in Olympia, telling Hays that if any of these people did not have the ready cash, that the United States National would be glad to advance the cash on their notes, but for Hays to make it appear that he, Hays, was making the loan.

That Gilchrist was in a hurry to get the Olympia

bank started, so instead of waiting for Hays to place this thirty-five or forty thousand dollars of stock, he believing Hays would soon do so, urged Hays to subscribe for about twenty-five thousand more than he had agreed with Hays for Hays to finally carry; that for the purpose of handling this twenty-five thousand dollars' worth of stock and of soon getting it out to prospective owners, Gilchrist would make him a loan from the Union Loan & Trust Company for this amount, and as Hays would sell a block of the stock he would remit either the cash, or other evidences of value the prospective stockholder should give to Gilchrist, and this amount of stock would be forwarded to Hays for delivery and Hays' debt to the Union Loan & Trust Company reduced to that extent.

That is why Hays charged the United States National with fifty-five thousand of our capital instead of fifty thousand, knowing that as he disposed of this stock he would collect 1.10 for it.

That the organization of the Olympia Bank & Trust Company was of much benefit to the United States National.

That the United States National was in a failing condition.

That the officers were all "sweating blood" to keep it going.

That to do so they were juggling accounts and resorting to apparent and actual crimes to save their bank.

That the fifty thousand dollars certified to by their cashier was a checking, bankable account; that when so certified by their cashier and acted upon and taken for its face by the State Bank Examiner, it was binding on all the world.

That the charter issued by the State Bank Examiner cannot be questioned except by the state in a direct proceeding to annul.

That the only fraud practiced was that involving the issuance of two drafts by Hays amounting to $36,550, ostensibly to pay Hays' personal notes.

That these drafts were never negotiated; that if they had been they were void as against direct statutory provisions.

That if there was fraud in organizing the Olympia Bank & Trust Company the United States National benefited by that fraud and should not be allowed to profit by its own fraud.

That if fraud existed in the organization a trust resulted in favor of all those who were innocent of such fraud.

Respectfully submitted,
P. M. TROY,
Solicitor for Receiver McKinney.
C. WILL SHAFFER,
Solicitor for Interveners.